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No. 83-623

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

FRANK B. JAMES, ET AL.,
Petitioners,

v.

JAMES G. WATT, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to review the Court of Appeals' decision that individual Indians, as opposed to an Indian tribe, could not maintain a centuries old claim to their ancestral lands under either the so-called "Nonintercourse Act" or the Constitution of the United States.

2. Whether this Court should grant a plenary review of the Court of Appeals' procedural decision upholding the denial of a Motion To Amend the Complaint which was not only filed after judgment had issued but also sought to realign the parties, making the defendant Gay Head Tribe a plaintiff, and to reassign the lawyers for the parties, ousting the alleged tribe's counsel from the case.

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STATEMENT OF THE CASE

One hundred and two individuals claiming to be the "James Faction" of the alleged Wampanoag Tribe of Gay Head originally filed this action in the district court claiming the right to possession of all the lands in the town of Gay Head, Massachusetts. They filed as individual Gay Head Indians, as members of the Wampanoag Tribe of Gay Head, and as they represent a class consisting of all members-decendents of the Gay Head Indian Tribe appearing on the Massachusetts Tribal Census of 1849 and 1861. While they claim to be a faction of the alleged Gay Head Tribe, they did not purport to represent the tribe itself and in fact named the Gay Head Tribe and the Wampanoag Tribal Council as defendants.

This rather unorthodox alignment of parties can only be understood by making reference to another Indian land claim suit involving the Town of Gay Head, pending since 1974 before the District Court for the District of Massachusetts, Wampanoag Tribe of Gay Head, et al. v. Town of Gay Head, et al. (C.A. No. 74-5826-McN) (hereinafter, "Gay Head I"). The Amended Complaint in Gay Head I names as plaintiffs the alleged Wampanoag Tribe of Gay Head, and the Wampanoag Tribal Council of Gay Head, proclaimed to be the governing body of the alleged tribe. Gay Head I was brought against the Town of Gay Head and several other defendants, primarily private land owners.

The parties to that action, including the Commonwealth as a defendant-intervenor, engaged in a long and often

difficult negotiation process and have now reached but not yet executed an agreement which, after appropriate action by the Congress and the Massachusetts General Court, will settle the dispute. It is this nascent settlement that prompted the "James Faction" of the alleged tribe to file this action.

These petitioners are dissatisfied with the settlement agreement, yet because they are a minority group within the alleged tribe, they were simply outvoted by a majority of the membership. Not willing to accept this decision of the majority, the minority faction attempted to circumvent the results of the tribal vote by seeking to intervene in the original action as a separate plaintiff. They withdrew the application, however, after it was opposed by all the parties. These dissident

individuals then filed this separate action seeking relief pursuant to the Nonintercourse Act, 25 U.S.C. §177, the United States Constitution, and an assortment of federal statutes. After receiving motions to dismiss from each named defendant, the District Judge dismissed the complaint on December 18, 1982. The basis for the dismissal was that only Indian tribes, and not simply individual Indians, could raise a claim under the Nonintercourse Act.

Following dismissal, these petitioners moved to cure the obvious defects in their complaint by adding the Gay Head Tribe, the Wampanoag Nation, and Ellsworth Oakley as named plaintiffs. They took this action even though the alleged tribe was already represented by counsel and involved as a named defendant. The

district judge promptly denied the motion.

On January 14, 1983, the petitioners filed a Notice of Appeal. The First Circuit Court of Appeals issued its Opinion on August 24, 1983, and affirmed the decision of the district court. The petitioners then filed this petition for writ of certiorari.[1/]

1/ The petitioners made two further attempts to frustrate the settlement process. First, they sought to renew their Motion to Intervene in Gay Head I. Once again, it was opposed by all the parties. The district judge denied the application on February 24, 1983. The "James Faction" filed a Notice of Appeal from that denial and briefs were actually filed with the Court of Appeals, but the appeal was ultimately withdrawn.

Second, they filed an action in the Massachusetts Probate Court contending that as a state chartered corporation, the plaintiffs in Gay Head I would be acting ultra vires if they signed the settlement agreement. That case, as of this writing, has been removed to the United States District Court handling the Gay Head I matter.

REASONS WHY THE WRIT SHOULD BE DENIED

This case does not raise any special or important issues that warrant certiorari review. The petition raises no important questions of federal law. It does not present for review a decision which conflicts with any decision of this Court or any other federal court of appeals. Finally, and most important, the First Circuit Court of Appeals was correct in dismissing the appeal. The law is clear that the land claim brought by these individuals, may only be brought by an Indian Tribe; otherwise the claim must fail. Application of this well-settled premise was especially appropriate in the instant case since the alleged tribe had already instituted litigation, by now nine years old, on behalf of all its members, including

these petitioners. Finally, petitioners' attempt to amend their complaint after the judgment had issued was untimely and improper and properly dismissed.

I. The First Circuit Properly Ruled That Individual Indians Have No Standing To Bring A Claim Under The Nonintercourse Act.

The petitioners sought first and foremost to establish their rights under the so-called "Nonintercourse Act", 25 U.S.C. §177, which expressly speaks of conveyances from "any Indian Nation or Tribe of Indians," but not conveyances from individual Indians.[2/] There is

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2/ The Nonintercourse Act, 25 U.S.C. §177 provides in pertinent part:

> No purchase, grant, lease, or other conveyances of lands or of any title or claim thereto, from any Indian Nation or Tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. (emphasis supplied).

an unbroken line of cases in the First Circuit interpreting this statute and clearly establishing the principle that while tribes and those legitimately representing tribes have the right to maintain a claim for relief pursuant to 25 U.S.C. §177, individuals, tribal members or descendants of Indians do not. See Epps v. Andrus, 611 F.2d 915 (1st Cir. 1979); Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1978), cert. denied, 444 U.S. 866 (1979); see also Mashpee Tribe v. Watt, 542 F.Supp. 797 (D.Mass. 1982), aff'd, 707 F.2d 23 (1st Cir. 1983); Oneida Indian Nation v. County of Oneida, 434 F.Supp. 527 (N.D.N.Y. 1977); Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp., 418 F.Supp. 798 (D.R.I. 1976). The cases properly interpret the statute first by reference to its literal terms and second its

legislative history.[3] Both demonstrate that only tribes may bring claims under the Nonintercourse Act. Because the petitioners brought their action as individual Gay Head Indians, and in fact named the tribe as a defendant, the First Circuit quite correctly followed that line of cases. Petitioners have not and can not cite any contervailing authority.

3/ The Nonintercourse Act has historical antecedents dating back to 1790. In certain of its earliest formulations, the terms of the statutes precursors included references to Indians. More than one hundred years ago, however, Congress deleted any protection previously afforded individual Indians by the earlier forms of the Act. The 1834 Act limited the applicability of its predecessor, the 1802 Trade and Intercourse Act (Act of March 30, 1802, Ch. 13, Stat. 139) which had invalidated similar conveyances "from any Indian, or Nation, or Tribe of Indians."

The Attorney General does not presume that in this brief submission he can present the proposition better than the above cited opinions. Consequently he merely suggests that this case, particularly in light of its unique procedural posture, does not present an appropriate vehicle to review this long, unbroken line of precedents.

II. The First Circuit Properly Ruled That Petitioners' Complaint Stated No Cause of Action Independent of the Nonintercourse Act.

The petitioners next contend that standing to maintain their action was found under federal Indian common law and direct constitutional authority. The First Circuit disagreed.

The primary source of federal authority to regulate the disposition of Indian lands is found in the Commerce Clause, U.S. Const., Art. 1, Sec. 8, cl.

3, which provides in pertinent part that: "The congress shall have the power ... to regulate Commerce ... with the Indian Tribes." Within a year of receiving this full and complete power to regulate commerce with the Indian Tribes, the very first Congress exercised its perogative by enacting the Nonintercourse Act. It is currently embodied in 25 U.S.C. §177. As noted above, the current version of the Nonintercourse Act applies only to "conveyances of lands ... from any Indian nation or tribe of Indians"; all non-tribal references have been deleted from the act and only tribes and those representing tribes have standing under its provisions. Thus if there ever has been a federal Indian common law pertaining to the alienation of lands, it has long since been displaced by

the Nonintercourse Act. Since Congress has articulated that as a matter of federal law it is only Indian tribes and those representing tribes who may maintain an action under the Nonintercourse Act, it is the courts' duty to respect the will of Congress. See Northwest Airlines, Inc. v. Transport Workers Union of America, 451 U.S. 77, 96 (1981); Milwaukee v. Illinois, 451 U.S. 304, 317 (1981). Therefore, contrary to the petitioners' assertion, the First Circuit did not ignore the notion of federal supremacy over Indian lands and land claims; rather the First Circuit embraced it wholeheartedly and ruled accordingly.

Moreover, the petitioners' claim based on derivative rights, individual rights in tribal property, have no

viability in the absence of a tribal claim. An individual Indian's rights or interests in tribal property are measured wholly in relation to the nature and extent of the tribe's right. United States v. Chase, 245 U.S. 89 (1917). This necessarily implies that either a tribe already exists or that the petitioners represent an alleged tribe and advanced tribal claims. Since petitioners advance only individual claims, and the tribal claim is restricted to the preexisting Gay Head I litigation, their discussion of individual rights in tribal property is of no moment and cannot support their claim of standing.

Finally, the First Circuit affirmed without discussion the district court's conclusion that the Supremacy Clause

does not support the petitioners' cause of action. The claim was so specious that it did not warrant discussion. The Supremacy Clause is not a source of any federal rights; instead its gives priority to federal rights whenever they conflict with state law. Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 613 (1979). Since petitioners did not state a claim under the Noninter-course Act, the Supremacy Clause simply does not apply.

III. The First Circuit Was Correct In Upholding The District Court's Denial Of Petitioners' Post- Judgment Motion To Amend.

In disposing of the post-judgment motion to amend, the lower courts were also guided by well-established principles of law which need not be reviewed by this Court.

Petitioners' attempt to amend their complaint after judgment had issued against them was not justified under any standard of liberal pleading. First, the motion was clearly not timely filed. A motion to amend should ordinarily be made prior to the issuance of judgment, otherwise the notion of finality of judgments would ring hollow. This is made evident in the instant case, where the petitioners sought to amend their complaint solely to circumvent the judgment just issued against them. Second, the petitioners sought to amend their complaint by realigning the parties to the action and adding the Wampanoag Tribe of Gay Head as plaintiff, even though (1) they were already a named defendant, (2) they were already represented by counsel and had vigorously

challenged the petitioners' authority to maintain the action, and (3) they were already party plaintiffs in an ongoing suit making similar claims. There is no justification for such a motion. Petitioners' post-judgment motion to amend was appropriately denied.

CONCLUSION

Because it presents no important, unsettled questions of law and because the lower courts disposed of this action in accordance with well-established precedents, the petitioners' application for a writ of certiorari should be denied.

Respectfully submitted,

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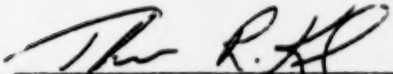

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